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8 PRENUPTIAL AND TENANCY AGREEMENTS AS RELATIONAL CONTRACTS

Alexander Flos*

8.1 INTRODUCTION

Contract theory is a much-debated topic. Atiyah, for example, wrote about how contract law has developed over the past three centuries, arguing that we have seen ‘the rise and fall of contracts’.¹ Even more radical is Gilmore who, in his ominously titled book, *The Death of Contract*, stressed the artificiality of contract law.² There is a general lack of consensus regarding contract theory, partly owing to country-specific differences, as well as to different methods and theories being used to explain contracts. When considering Life Time Contracts, however, one cannot feel other than uneasy about the current state of affairs, where all contracts are forcibly modelled to fit the ‘ideal type’ of contract, with its emphasis on the principles of consent, freedom of contract, and *pacta sunt servanda*. This applies especially in the case of Life Time Contracts, which tend to be long-term and relate to people’s fundamental needs and wants. However, any alternatives to these principles are currently absent in the case of such contracts.

Dutch contract law is based on three general principles derived from classical law theory: consent, freedom of contract, and *pacta sunt servanda*. These general principles were developed to regulate short-term contracts, such as sales contracts. In practice, however, they are applied to all types of contracts. Provisions dealing with long-term contracts – such as employment contracts and tenancy agreements – are considered to be mere exceptions to these general principles, which focus mainly on the relationships between parties at the moment they enter into the contract, rather than on how these relationships may develop over time. Applying these principles to long-term contracts is thus, problematic as it neglects the evolving character of parties’ relationships. Given that a long-term contract can last for 30 years or more, it is doubtful that emphasizing on the moment when the parties originally entered into the contract does justice to its long duration. To remedy this deficiency, more attention must be paid to the parties’ relationships throughout the duration of a long-term contract. In long-term relational contracts,

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1 P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, Clarendon Press, Oxford, 1979.

2 G. Gilmore, *The Death of Contract*, Ohio State University Press, Columbus, OH, 1974.

the personal relationship between the parties is often more important to them than their contractual relationship. And, in order to fully understand the contractual relationship in a long-term contract, it is necessary to look at behavioural norms.

This chapter first discusses the problems that arise when applying general principles of contract law to the way in which long-term contracts are regulated and then presents an alternative approach – ‘Relational Contract Theory’ (RCT) – that focuses on the parties’ relationship during the term of the contract. The case study chosen for this purpose examines two social long-term contracts:³ prenuptial agreements and residential tenancy agreements.⁴ I will argue that the three general principles of contract law are ill suited to regulate these types of long-term contracts and that more attention should be paid to the parties’ evolving relationship. This is a more suitable approach, given the RCT’s focus on the parties’ relationship, rather than on the ‘black and white’ letter of the contract itself.

The RCT recognizes that every relationship is guided by behavioural norms. These behavioural norms continue to influence the parties long after the contract has been entered into, guiding how those parties interact, regardless of their formal contractual rights and duties. I will argue that the emphasis on long-term relational contracts should be on the relational dimension and the norms that stem from that relationship during the term of the particular contract. Specifically, I argue in favour of applying the RCT, which conforms to Point 6 of the European Social Contracts Group Declaration (‘EuSoCo Declaration’), which states that the law “should be able to cope with long-term relational problems of changes in human lives instead of providing only remedies typical of spot contracts.”⁵

The first section discusses the three principles of contracts law and explores the problem of applying them to long-terms contracts, particularly the fact that they give long-term contracts a too-static character. The second section presents the RCT as an alternative way of viewing long-term contracts and as a solution to the problems presented by current contract law. The third section focuses on prenuptial and tenancy agreements, analysing them from an RCT perspective and assessing the extent to which they are in conformity with the RCT.

3 Social long-term contracts are defined as “long-term social relationships providing goods, services and opportunities for work and income-creation, which are essential for the self-realisation of individuals and their participation in society at various stages in their life”. See Principle 1, ‘Principles of Social Long-term Contracts’, in L. Nogler & U. Reifner (Eds.), *Life Time Contracts: Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law*, Eleven International Publishing, The Hague, 2014, p. 5.

4 This chapter will only focus on residential tenancy agreements, commercial tenancy agreements are excluded.

5 Nogler & Reifner (Eds.), *supra* note 3, p. 22.

8.2 THREE GENERAL PRINCIPLES OF CONTRACT LAW

Three principles of contract law – consent, freedom of contract, and *pacta sunt servanda* – are commonly perceived as general principles of Dutch contract law.⁶ These principles cover the various stages of a contract. The principle of consent is most important when the contract is being entered into, while the principle of the freedom of contract mainly relates to the contents of the contract, and *pacta sunt servanda* governs the final stage of the contract. Although these three principles were conceived of with short-term or synallagmatic spot contracts, such as sales contracts, in mind, and they have become general principles applying to all contracts and they form the basis of Dutch contract law. However, these general principles are not as general as they may suggest because they do not apply equally to all contracts. As will be explained below, the application of these principles to long-term contracts can be particularly problematic.

8.2.1 Consent

For a contract to be valid, the only requirement needed to satisfy the principle of consent is the parties' mutual agreement. No other requirements, such as a requirement for the contract to be in writing, have to be met for the contract to be considered valid. The most important element in this mutual agreement is the will of the parties, which can be expressed verbally, either orally or in writing, or non-verbally. Dutch contract law codifies this principle in Article 217, Book 6 Dutch Civil Code (DCC), which states that only 'an offer and its acceptance' are required for the conclusion of a valid contract. Under Article 37, Book 3 DCC, such declarations can be made in any form. The moment at which the parties reach mutual agreement is the moment at which the contract is seen as being concluded. However, there are several exceptions to this general rule.

The most important exception to this principle relates to contracts that are required by law to be in a specific form, such as in writing or in the form of a notarial deed. A contract that fails to comply with the legally required form is void. Article 2, Book 7 DCC states, for example, that a contract for selling a house must be in writing, while Article 115, Book 1 DCC states that prenuptial agreements must be recorded in a notarial deed. Formal requirements for entering into contracts are usually intended to protect the interests of one or both of the parties to the contract and, sometimes, even those of third parties. Most importantly, the requirement of a written contract forces parties to specify their agreements, and so does not allow scope for any unexpressed expectations of the

6 J.H.M. van Erp, *Contract als rechtsbetrekking. Een rechtsvergelijkende studie*, W.E.J. Tjeenk Willink, Zwolle, 1990, p. 10; T. Hartlief, 'Vrijheid en bescherming in het contractenrecht', *Contracteren: tijdschrift voor de contractspraktijk* 2003, p. 5; J.M. Smits, 'Eenheid en verscheidenheid in het contractenrecht. Over het gede-termineerd verleden en de postmoderne toekomst van het privaatrecht', *Rechtsfilosofie & Rechtstheorie* 1998, p. 13.

parties, as opposed to hard and fast agreements, also to become part of the contract. This also means that no implicit agreements or implicit changes in the original agreement can be assumed unless they are recorded in writing. All of these factors add even more weight to the importance of the written contract.

8.2.2 *Freedom of Contract*

The second principle in Dutch contract law is the freedom of contract, which means that parties are free to decide whether to enter into a contract and free to determine its contents. In general, parties are free to shape their contractual relations as they see fit. Under the principle of consent, parties need to agree on all aspects of their contract when they enter into it, because that is when the contract is seen as being concluded. In its classical form, the principle of the freedom of contract reflects that the parties have autonomy when deciding to enter into a contract.

However, this freedom is not unlimited. Certain types of contracts, for example, include provisions to protect the weaker party. In theory, the general principle of the freedom of contract in Dutch law also applies to employment contracts and tenancy agreements. In practice, however, their application is limited by the specific provisions governing these types of contracts, which are specifically designed to protect the employee or tenant. Dutch contract law has also developed over the years and now places more emphasis on solidarity, thereby, forcing parties to take account of the other contractual party's interests.⁷ This explains why legal provisions have been introduced to require contracting parties to provide certain information to each other or to protect the interests of the other party. A bank, for example, has to actively warn its customers of the risks of investing in shares. These obligations are based on the general provision of Article 2, Book 6 DCC, which obliges contracting parties to act towards each other in accordance with the requirements of reasonableness and fairness.

The interpretation of contracts also curbs parties' freedom of contract. If parties later disagree on what their contract means, the contract has to be interpreted by a court. The fact that a disagreement has arisen suggests that the parties never reached full, mutual agreement. However, they will be bound by the court's interpretation of their contract. Contract law also provides default rules to fill any minor gaps in the contents of a contract. These default rules are legitimized by the assumption that the parties have implicitly agreed to the missing terms. In reality, however, they represent another exception to the principle of the freedom of contract as the parties never actually reached agreement on those missing terms.

In addition, it is not only the law that curbs the freedom of contract: parties are not always able to foresee all possible eventualities when entering into a contract. This can

⁷ Hartlief, *supra* note 6, p. 6.

make the freedom of contract illusory, especially in the case of long-term contracts. This is referred to as ‘bounded rationality’, whereby parties cannot foresee or contemplate, at the time of contracting, all the possibilities that may arise and how their relationship will evolve, especially in the case of long-term contracts.⁸ Yet, the law requires parties to cast all the details of their contract in stone at the time they enter into it.

8.2.3 Pacta Sunt Servanda

Under the principle of *pacta sunt servanda*, parties are bound by a contract as soon as they enter into it. According to *pacta sunt servanda*, parties cannot terminate or alter the contract unilaterally, unless they specifically addressed that possibility at the time of concluding the contract. Although the strict rules on the binding nature of contracts do not cause problems in the case of synallagmatic spot relationships, they can cause problems in the case of long-term contracts.

As most sales contracts are short-term contracts, there is usually little need to alter or terminate them at an early stage. As the DCC takes sales contracts to be typical of all contracts, the only opportunity it provides for early termination of a contract is when there is a problem with performance on the part of one or both parties. If one party’s performance is inadequate, the other party has a statutory right to terminate the contract (rescission; Article 265, Book 6 DCC). Under the influence of EU law, consumers now also have the right to unilaterally terminate a consumer sales contract within a certain ‘cool-off period’ in certain circumstances.

In the case of long-term contracts, however, strict application of the principle of *pacta sunt servanda* can be problematic. The only remedies that Dutch law provides for a party wishing to alter or terminate such a contract is the option to invoke the general provisions on reasonableness and fairness (Article 248(2), Book 6 DCC) or to invoke an unforeseen change of circumstances (Article 258, Book 6 DCC). However, both these remedies have a relatively limited scope of application. Contract provisions can be set aside by a court if they go against the requirements of reasonableness and fairness. A contract can also be altered or terminated if the circumstances have changed to such an extent that the petitioner cannot reasonably be expected to remain bound by the contract in its original form. However, this does not give much flexibility to change or terminate a long-term contract unilaterally if parties cannot reach mutual agreement. The Dutch Supreme Court has, therefore, ruled that a long-term contract entered into for an unspecified period can be terminated unilaterally even if the DCC does not make any provision for this.⁹

8 A. Sanders, *Statischer Vertrag und dynamische Vertragsbeziehung: Wirksamkeits- und Ausübungskontrolle von Gesellschafts- und Eheverträgen*, Verlag Ernst und Werner Gieseking, Bielefeld, 2008, p. 314.

9 See the Dutch Supreme Court ruling: 28 October 2011, ECLI:NL:HR:2011:BQ9854, Nederlandse Jurisprudentie 2012, p. 685 (Ronde Venen/Stedin).

8.2.4 *Concluding Remarks*

Parties who enter into a contract through which they intend to cooperate for a long period of time are obliged to be flexible. They must be prepared to adjust the contract in light of changes in circumstances or to subsequently tie off issues that were left open or were unforeseen at the time the parties entered into the contract. The decisions that parties make when they enter into a contract can be limited by bounded rationality (i.e., information, time, and knowledge). When entering into a long-term contract, parties cannot possibly know how their business or other contractual relationships will develop over time. The same is true for future external developments that can affect contractual relationships. All this argues in favour of allowing more flexibility to alter or terminate long-term contracts, including, if necessary, unilaterally. Applying the above-mentioned general principles of contract law to long-term contracts identifies the moment when the contract is concluded as the moment when all of the parties' future rights and obligations are fixed. However, such an emphasis on the moment at which the contract is concluded gives the contract a static character because, from that point onwards, everything becomes cast in stone, potentially for years to come. This is not a problem for short-term contracts, such as the 'spot' sales contract entered into when someone buys a newspaper at a local shop on the spot. In the case of long-term contracts, however, which may last as long as the marriage or until the death of a party, the rigidity of these principles results in potentially detrimental inflexibility.¹⁰

True, contract law offers little scope for flexibility. However, parties can remedy this shortcoming by incorporating provisions into their contracts that allow them to alter or renegotiate contractual terms in the future. Without such provisions, problems are likely to emerge, particularly when one of the parties is unwilling to cooperate. In addition, the behaviour of parties to a long-term contract differs from the behaviour of parties to a sales contract; the former are more inclined to cooperate, be flexible, and take the interest of the other party into consideration, because they value the ongoing relationship. This behavioural aspect is lacking in current contract law as it treats all contracts as short-term spot contracts. Therefore, it would be better to have a contract theory that takes this difference into account and it is for this the RCT offers an alternative.

8.3 RELATIONAL CONTRACT THEORY

The RCT, as put forward by Macneil, places contracts in their societal context. In this way, a contract is seen firstly as a means to enable rather than to determine cooperation between the contracting parties and so is governed not only by legal rules, but also by behavioural norms. For a clearer view of these norms, it is necessary to study the context

10 M.A. Eisenberg, 'Why There Is No Law of Relational Contracts', 94 *N.W.U. L. Rev.* 2000, p. 807.

of a contract and the relationships between the parties.¹¹ In other words, contracts should be seen as transactions embedded in complex relationships. To understand the transactions, therefore, we must first understand the underlying relationship.¹² The RCT also makes a distinction between discrete contracts, when the relationship between the parties is of no or less relevance, and relational contracts, when the relationship between the parties is of defining importance. The RCT sees every contract falling somewhere along a continuum of discrete and relational contracts. Although a short-term contract is more likely to be a discrete contract than a relational contract, a short-term contract, too, cannot be fully understood without understanding the relationship in which it is embedded and the norms flowing from that relationship.

Macneil refers to 'common contract norms' that are relevant for any type of contract, regardless of whether it is discrete or relational. However, some of those norms are more applicable to discrete contracts, while others are better suited to relational contracts. By contrast, the general norms of Dutch contract law tend to focus more on discrete contracts, particularly those of a short-term nature.

8.3.1 *The Contract*

According to the RCT, a contract is a means for people to cooperate and to exchange commodities and services. A contract has four primal roots.¹³ The first of these primal roots is society.¹⁴ Parties can only understand, conclude, and perform a contract if they have a common frame of reference; in other words, a common means of communication. What is considered to be an offer or acceptance of a contract depends on the specific society and its behavioural codes. In Bulgaria, for example, people nod their head to say 'no' and shake their head to say 'yes', which would lead to misunderstandings if a Bulgarian were to shake his head to indicate his wish to accept an offer and enter into a contract in the Netherlands.

The second primal root is labour specialization, which means that nobody is self-sufficient. As a result, we are all forced to exchange goods and services with other people, and these exchanges are made in the form of contracts.

11 In his later work, Macneil referred to the 'Essential Contract Theory' in order to distinguish this theory from other Relational Contract theories. See I.R. Macneil, 'Contracting Worlds and Essential Contract Theory', 9 *Soc. Legal Stud.* 2000, p. 432.

12 I.R. Macneil, 'Relational Contract Theory: Challenges and Queries', 94 *N.W.U. L. Rev.* 2000, p. 881.

13 I.R. Macneil, 'Whither Contracts?', 21 *J. Legal Educ.* 1969, p. 408; I.R. Macneil, 'The Many Futures of Contracts', 47 *S. Cal. L. Rev.* 1974, p. 696 *et seq.*; I.R. Macneil, *The New Social Contract: The Inquiry into Modern Contractual Relations*, Yale University, New Haven, CT, 1980, p. 1 *et seq.*

14 I.R. Macneil, 'Essays on the Nature of Contract', *N.C. Cent. L.J.* 1979, p. 172 *et seq.*

The third root is the freedom of choice. This distinguishes contracts from other types of exchanges, such as forced labour. People enter into a contract of their own free will and are not forced to do so. There is thus, a difference between forced and unforced contracts.

The fourth and final primal root is the awareness of the future. Contracts always involve an exchange in either the near or the distant future. Such an exchange is not possible without an awareness of the future; in other words, if the parties are just living in the 'here and now', they do not contemplate or plan for future needs, wants, or events. Buying a plane ticket to go on a holiday to Greece, for example, requires making plans for the future, even if the contract itself is entered into weeks before this.

A contract, thus, is a means for people to cooperate with each other and can be defined as 'relations among people who have exchanged, are exchanging, or expect to be exchanging in the future'.¹⁵ Contract law's function is to facilitate cooperation between people who want to exchange particular goods or services. The rules set out in contract law are not just directed specifically at the parties in question. They also influence the expectations of other people, who expect the parties in question to behave in such and such a way. In this way, contracts function as a basis for accomplishing exchanges of goods and services and for enabling exchanges between people.

An important aspect of such cooperation is what Macneil refers to as '*presentiation*'.¹⁶ This is the act of bringing future needs into the present and acting accordingly. If people have full *presentiation* at the moment they conclude a contract, they can foresee exactly what they will need in the future. When it comes to long-term contracts, however, full *presentiation* is illusory. The general principles and rules of contract law attempt to contradict this reality by freezing the parties' relationship at the moment they enter into the contract and forcing them to behave accordingly. The principle of *pacta sunt servanda*, for example, requires parties to foresee all of the possible future developments relevant to their long-term contractual relationships at the moment they enter into the contract.¹⁷ However, this is not feasible for long-term contracts.

8.3.2 *Discrete versus Relational Contracts*

The RCT distinguishes between two types of contracts: discrete contracts and relational contracts. A discrete contract is a contract for which the parties' relationship is frequently of little or no relevance. In general, though not always, these types of contracts tend to be

15 I.R. Macneil, 'Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos', 143 *J. Inst. Theo. Econ.* 1987, p. 274.

16 I.R. Macneil, 'Restatement (Second) of Contracts and Presentiation', 60 *Va. L. Rev.* 1974, p. 589.

17 Macneil 1974, *supra* note 13, p. 802; P. Linzer, 'Uncontracts: Context, Contorts and the Relational Approach', *Ann. Surv. Am. L.* 1988, p. 155-156.

of short duration, and so cooperation between the parties is relatively limited over time.¹⁸ A relational contract, on the other hand, is typically a long-term contract, for which the relationships between the parties are more important.¹⁹ In both cases, however, the context in which the contract was entered into and the relations between the parties are important.

An example of a discrete contract is one in which a cyclist on a holiday in another country visits a local bicycle repair shop to have his gears fixed. This is a one-off transaction, in which the relationship between the parties is less important. After entering into and performing the contract, the parties will part ways and will most likely never see each other again, let alone enter into a contract again. Even so, the context of the contract is still significant. This context, which is so natural that lawyers tend to overlook it, includes the culture of cycling, the concept of 'money', the legal concept of ownership of the bike, and the social conventions that underlie the parties' interaction.²⁰ Even in the case of discrete contracts, therefore, it is important not to ignore the context in which contracting takes place.

There are three characteristics that distinguish discrete and relational contracts.²¹ Firstly, the duration of the contract is important. Buying a magazine at a newspaper kiosk is limited in time and usually regarded as a discrete contract. This applies unless, for example, the purchase becomes a habit and the buyer chooses to go to the same kiosk on a regular basis. Secondly, the parties' obligations in discrete contracts are more clearly defined. This reflects the often-limited duration of such contracts.²² Thirdly, the parties involved in discrete contracts are less dependent on each other as their relationship does not normally go beyond a single transaction. These three characteristics indicate whether a contract is of a more discrete or a more relational nature.

Here, we can already see how general contract law (being the general principles and rules of contract law: consent, freedom of contract, and *pacta sunt servanda*) differs from an RCT approach to contracts. The former, which builds upon the general principles and rules of consent, freedom of contract, and *pacta sunt servanda*, tends to treat all contracts as if they were discrete contracts, with the sales contract as a typical example. In this way,

18 Macneil 1987, *supra* note 15, p. 275; N.M. Crystal, 'An Empirical View of Relational Contracts under Article Two of the Uniform Commercial Code', *Ann. Surv. Am. L.* 1988, p. 298; R.C. Bird, 'Employment as a Relational Contract', 8 *U. Pa. J. Lab. & Emp. L.* 2005, p. 152.

19 Bird, *supra* note 18, p. 151.

20 I.R. Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law', 72 *N.W.U. L. Rev.* 1978, p. 857, n. 10.

21 R.E. Speidel, 'The Characteristics and Challenges of Relational Contracts', 93 *N.W.U. L. Rev.* 2000, p. 823 *et seq.* As well as these three general basic characteristics, Speidel recognizes certain additional features that distinguish discrete contracts from relational contracts: future cooperation is expected and can be facilitated by mechanisms agreed by an authority, while the costs and benefits of the relationship have to be shared instead of divided, transaction-specific investments may be made and, lastly, the personal relation between the contracting parties comprises an integral part of the relationship.

22 J. Goetz & R.E. Scott, 'Principles of Relational Contracts', 67 *Va. L. Rev.* 1981, p. 1091.

general contract law implicitly gives priority to the norms of discrete contracts, with their focus on the immediate benefits derived by each of the individual contracting parties, instead of focusing on the underlying cooperation and reciprocity between them. This is at odds with relational contracts, where the relevant behavioural norms tend to stress flexibility and reciprocity²³ and even sometimes at odds with discrete contracts themselves, as the relationship is also of importance to these types of contracts, albeit to a lesser extent.

This means that any analysis of relational contracts should start by recognizing such contracts as relational and identifying the relevant behavioural norms that give rise to the specific relationship between the parties. Such an analysis should aim to establish whether contract law contributes positively to these relationships or whether it obstructs them. For this, a more in-depth examination is needed of the various types of behavioural norms that govern contracting parties' behaviour in relational contracts.

8.3.3 *Contractual Behavioural Norms*

The way parties behave during negotiations, when concluding a contract, during performance, or when terminating a contract is influenced by whether the contract is more discrete or more relational, and the behavioural norms stemming from this.²⁴ Focussing solely on the 'black and white' contractual arrangements gives an incomplete image of the contract. Classical contract law treats every contract as a discrete contract by emphasizing on discreteness and *presentiation*, thereby, enhancing behaviour linked to discrete contracts.²⁵ Firstly, the identity of the contracting parties is generally viewed as irrelevant. Secondly, parties themselves determine a contract's duration by including a time limit in the contract. Lastly, few remedies are available to contracting parties wanting to change or terminate their contract and thus, enhance *presentiation*.

The RCT, in contrast, insists that the analysis of contracts should start by analysing the relationships between the contracting parties as governed by behavioural norms,²⁶ rather than by analysing the terms of the contract as governed by contract law, because this will present a better picture of the contract. Classical contract law, however, still promotes an analysis focussing on the terms of the contract, which it regards as complete and closed. This leaves little, if any, room for analysing the circumstances in which the

23 Macneil 1974, *supra* note 13, p. 761.

24 D. Campbell, 'Ian Macneil and the Relational Theory of Contract', CDAMS Discussion Paper, March 2004, p. 16.

25 Macneil 1978, *supra* note 20, p. 863-864.

26 I.R. Macneil, 'Reflections on Relational Contract Theory after a Neo-classical Seminar', in D. Campbell, H. Collins & J. Wightman (Eds.), *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts*, Hart Publishing, Oxford/Portland, OR, 2003, p. 210.

contract is embedded, in other words, for analysing the relationship between the parties and the interplay of behavioural norms.

Macneil described ten common behavioural norms that influence the behaviour of contracting parties.²⁷ These are: (1) role integrity, or the behaviour expected of a person in a given social position; (2) reciprocity, or the idea that contracting parties will receive benefits from the exchange; (3) implementation of planning, or how things are planned and structured; (4) effectuation of consent: this derives from the primal root of choice, where a party chooses and, if necessary, forces the other party to comply with the exchange; (5) flexibility: this is at odds with the idea of effecting consent and implementing planning; (6) contractual solidarity, or the idea of holding the exchange together; (7) the interests of restitution, reliance, and expectations, which are all based on promises by one party on which the other party has come to rely; (8) creation of the restraint of power: in order to have reciprocity and solidarity, and for the exchange to continue, there should be a balance between the parties; (9) property of means; and (10) harmonization with the particular matrix.

Discrete behaviour gives rise to discrete legal norms, while relational behaviour should give rise to relational legal norms.²⁸ These two separate groups of norms are intensifications of common contract norms, some of which tend to be more discrete, while others tend to be more relational. The RCT claims that contracting parties' relationship should be at the forefront of the analysis, not their legal contract. This is because the behaviour of contracting parties is guided primarily by behavioural norms, such that it is important that legal norms should reflect those behavioural norms. Otherwise, there will be a discrepancy between the way parties behave, based on behavioural norms, and the legal norms of contract law.

A correlation between behavioural norms and contract law norms is particularly important in the case of relational contracts. Behavioural norms that are relevant for discrete contracts differ from those that are relevant for relational contracts. In long-term relational contracts, reciprocity, restraint of power, and solidarity are all significant as they facilitate the continuation of the contract. In relational contracts, the parties have a greater interest in cooperation and reciprocity because the relationship between the parties is of longer duration and more valuable than the immediate benefits.²⁹ If a long-term contract is going to last, the parties must be willing to continue to cooperate with each other. This, in turn, requires the contractual obligations to be balanced: "The more an exchange system is perceived as wrongly uneven, the more its beneficiaries must depend

27 *Id.*, p. 213. See also M.W. de Hoon, *Conflictbeheersing bij opzegging*, Boom Juridische uitgevers, The Hague, 2005, p. 101 *et seq.*, for a detailed description of the ten behavioural norms, which she describes as behavioural structures.

28 Macneil 1987, *supra* note 15, p. 276.

29 Campbell 2004, *supra* note 24, p. 19.

on external force to maintain it".³⁰ Flexibility is also important in such contracts, owing to the limited potential for full *presentation*, especially when a relational contract is of long duration.

In the case of discrete contracts, by contrast, the effectuation of consent is more important, more emphasis is placed on the parties pursuing their own benefits, and there is more competition between the parties. Each party tries to maximize its own benefits from the contract because the contract is of short duration and the relationship between the parties is less important to them than the immediate benefit.

8.4 PRENUPTIAL AND TENANCY AGREEMENTS AS RELATIONAL CONTRACTS

Parties (to relational contracts) treat their contracts more like marriages than like one night stands. Obligations grow out of the commitment that they have made to one another, and the conventions that the trading community establishes for such commitments; they are not frozen at the initial moment of commitment, but change as circumstances change; the object of contracting is not ... to allocate risks, but to signify commitment to co-operate. In bad times the parties are expected to lend one another mutual support, rather than standing on their rights; each will treat the other's insistence on literal performance as willful obstructionism ... and the sanction for egregiously bad behavior is always ... refusal to deal again.³¹

Prenuptial and tenancy agreements in the Dutch legal system fall within the domain of contract law. Thus, the general rules of contract law, stressing discreteness, apply to both of them. In the case of tenancy agreements, however, there are certain specific provisions that are entirely lacking in the case of prenuptial agreements, even though both types of contracts are highly relational. With this in mind, I now turn to the analysis of such contracts, particularly their underlying relationships, in order to assess whether Dutch contract law takes their relational dimension into consideration. I start by describing the importance of the relationships between the parties to these contracts and then turn to the contracts themselves and the rules of contract law governing them.

30 I.R. Macneil, as cited in S. Macaulay, 'Relational Contracts floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein', 94 *N.W.U. L. Rev.* 2000, p. 776.

31 R.W. Gordon, 'Macaulay, Macneil, and the Discovery of Solidarity in Contract Law', *Wis. L. Rev.* 1985, p. 569, as cited in D. Kimel, 'The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model', 27 *Oxford J. Legal Stud.* 2007, p. 236.

8.4.1 *Relationships between Parties and Behavioural Norms*

In the Netherlands, the default statutory matrimonial property regime is the universal community of property.³² All the assets of spouses, acquired before and during marriage, are part of the community of property. To a certain extent, this legal regime reflects the nature of the de facto relationships between spouses. Marriage presupposes affective relations, based on a commitment to share life together until death. This can be the reason why many spouses in the Netherlands choose to follow the default statutory matrimonial property regime and opt for the universal community of property, for it reflects this bond and lifelong commitment.

Instead, in the Netherlands, prenuptial agreements are intended to keep the assets of spouses separated, thereby, avoiding their assets becoming part of a community of property. Typically, spouses will opt for prenuptial agreements that exclude any community of property, with or without a contractual obligation to periodically divide any acquired gains. If one spouse owns his or her own business or is a lot richer than the other spouse, that solution might be advisable. However, spouses conclude prenuptial agreements even if this does not apply to them, for around 20 to 25% of all married couples opt for prenuptial agreements. A prenuptial agreement in the Netherlands consists of a standard model of the notary, and is brief and not very detailed. A future spouse will normally not seek individual legal advice and instead will have legal advice together with their partner by a notary.

A prenuptial agreement is ancillary to marriage and, in the Netherlands, to a registered partnership, both of which are far more important and more far-reaching relationships between the parties than the prenuptial agreement itself. Being connected by marriage makes the relationship of parties who have signed a prenuptial agreement highly relational as their matrimonial relationship can also be described as a ‘partnership’. In other words, they are committed to work together for their mutual benefit, which makes the spouses less willing to pursue only their own interests, as the interests of the other spouse are considered to also be the first spouse’s own interest. The relationship between parties in a prenuptial agreement is – or at least is intended to be – of long duration. However, their obligations are not clearly defined, as it is not possible to foresee what will happen during the years to come. In addition, the views and opinions of spouses might change over time as well, making it troublesome to rely on the prenuptial agreement that was concluded many years ago. At the moment of entering into a prenuptial agreement, the future spouses do not usually yet know whether, for example, they will have children, or buy a house, or how their careers will develop. The parties to such agreements are interdependent, both emotionally and socio-economically and function as a unity. It is,

32 The law will change in 2018, from which point forwards, the community of property will only consist of assets acquired by spouses during their marriage.

therefore, fair to expect the behaviour of spouses to be determined more by the internal behavioural norms derived from the parties' internal marital relationship than by external contractual or statutory legal norms because, in principle, prenuptial agreements should be relevant throughout the whole marriage, keeping the assets of spouses separated, with the expectation that each spouse looks after his or her own interests, just as with any other contract. This is also due to people not being adequately informed about their own legal arrangements or they might have forgotten such legal arrangements, making it less likely for spouses to have their day-to-day lives influenced by prenuptial agreements.³³ Basically, prenuptial agreements serve to keep the assets of spouses separate, yet spouses will be less influenced by them than by non-legal norms during their marriage when making decisions that could be of relevance to their assets or matrimonial property.

The parties can be expected to behave as contractual partners in a way that reflects their affective relationship and to show a readiness to be attentive to the needs and wishes of the other person, at least as long as the relationship is in a good shape. Translated into terms of behavioural norms, this means that solidarity, role integrity, and harmonization with the social matrix will be particularly important for governing their contractual behaviour, especially within their own internal social matrix.³⁴ Spouses do not tend to alter prenuptial agreements after they get married as seeking to renegotiate such an agreement would be seen as a 'vote of no confidence'.³⁵ Role integrity means that even though they are contractual partners, spouses will behave primarily as spouses, rather than strictly in line with their 'black and white' contractual arrangements. Although gradually changing, traditional gender roles still play a significant role, as husbands are still more often the breadwinner, while wives are still more likely to be actively involved in bringing up children and running the household. The evolving nature of a relationship in such circumstances could involve a decision by the wife to sacrifice her career,³⁶ thus making the spouses even more interdependent and trusting that their relationship will last and not break down. Other important relational aspects include sexual fidelity, open communication and honesty, and interdependence – both economically (gender-specific role division) and emotionally. These behavioural norms, which emphasize on loving cooperation and solidarity, create expectations for spouses that might run counter to the arrangements they made in their prenuptial agreements. Moreover, these expectations, in turn, are not necessarily reflected in the matrimonial property arrangements they make when they conclude a prenuptial agreement.

33 A.-R. Poortman & M. Mills, 'Investments in Marriage and Cohabitation: The Role of Legal and Interpersonal Commitment', 72 *J. Marriage Family* 2012, p. 373.

34 Macneil 1987, *supra* note 15, p. 287.

35 E.S. Scott, 'Social Norms and the Legal Regulation of Marriage', 86 *Va. L. Rev.* 2000, p. 1909.

36 S. Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice*, Hart Publishing, Oxford and Portland, OR, 2015, p. 161.

Relationships between tenants and landlords are admittedly less relational than relationships between spouses or partners, and can vary depending on how close the cooperation is.³⁷ This is, of course, because parties to a residential tenancy agreement do not have an affective relationship. The relationship itself is also less intense as the tenant only needs to pay rent on a monthly basis, while the landlord just has to allow the tenant to live in the house. In the Netherlands, social housing corporations own 71.5% of all rented housing. This means that the relationship between the parties in a residential tenancy agreement is even less relational because the landlord in such cases is often an anonymous housing corporation. This is different in the case of residential rented properties owned by a private person. In those cases, the relationship between the residential tenant and the landlord is likely to be more relational.

Whatever the situation, tenancy agreements are nevertheless relational because they are long-term contracts. Therefore, not everything that could happen in their relationship can be foreseen at the time the parties enter into the contract. The parties to a residential tenancy agreement are interdependent: the tenant needs housing and the landlord wants to earn money by renting out his house. Such interdependence increases if, for example, the tenant has family members living in the house because these family members will then also depend on the same tenancy agreement for shelter.

Another important aspect of residential tenancy agreements is the existence of a weaker party. Generally, a residential tenant in the Netherlands is the weaker party because there has been a structural shortage of housing since World War II, which makes it more difficult for people to find affordable rental housing than for landlords to find tenants. Contract law assumes all persons are formally equal, so there would be no weaker party. However, the government has tried to balance this material inequality by introducing specific mandatory provisions to curb the contracting parties' freedom of contract and, thereby, protect residential tenants. In itself, this fits well with the nature of relational contracts, especially because it emphasizes solidarity and reciprocity by balancing the parties' obligations and also by the restraint of power.

8.4.2 *Flexibility in Prenuptial and Tenancy Agreements*

Dutch law on tenancy agreements consists largely of mandatory rules that leave little room for contractual freedom. If a home is classified as 'social housing', the rent payable by tenant is set by mandatory rules, and the parties are not allowed to deviate therefrom. It is also not easy to unilaterally change the terms of rental agreement. The landlord can only request the tenant to change the contract if the landlord's offer is reasonable and does not involve the amount of rent to be paid. If they do not reach agreement, the landlord will have to go to court, to get the permission from a judge to change the tenancy

³⁷ Eisenberg, *supra* note 10, p. 814.

agreement if and only if the offer of the landlord is reasonable. Importantly, when a property needs to be renovated (which may occur years after the tenancy agreement is signed), the law allows the landlord to force the tenant to cooperate. This way, the tenant also has a relational obligation to cooperate in order to make sure the property gets the necessary renovation.

Prenuptial agreements are concluded in a different way from tenancy agreements. No specific form is prescribed for tenancy agreements, whereas, under Article 115, Book 1 DCC, future spouses wanting to conclude a prenuptial agreement have to do so in a notarial deed. This enhances the discreteness of the contract as it forces the parties to record all their arrangements in writing at the time they enter into the contract. The reason for this requirement is the desire for legal certainty. The involvement of a notary avoids the risk of antedating and ensures that the parties are properly informed about the relevant law and the consequences of their choices. The downside to this requirement is that it gives prenuptial agreements a static character and makes it impossible for parties to amend them informally, given that every amendment has to be in a notarial deed. By contrast, no form requirements apply to tenancy agreements; even an oral agreement is valid. The absence of form requirements is necessary in order to protect the tenant. Otherwise, it would be easy for landlords to bypass the mandatory rules protecting tenants by refusing to conclude contracts in writing.

As one assumes that their marital relationship is more important to the spouses than their contractual relationship, most couples pay little attention to their prenuptial agreement as long as they remain married. For this reason, few couples decide to change their prenuptial agreement in the course of their marriage. Their relationship will progress and evolve over the years: children may be born, houses may be bought and sold, and careers may be made or given up. However, but most prenuptial agreements are never changed after they have been signed, and so continue to reflect the spouses' original situation. This can lead to problems in the case, for example, of prenuptial agreements that include a total separation of property. If spouses who were economically equal at the time of entering into the prenuptial agreement end up with a traditional role division (in other words, the husband becomes the main breadwinner and the wife gives up her career to look after the children), the wife can be seen as the weaker party, at least from a socio-economic perspective. Unlike in tenancy law, there are no specific provisions aimed at protecting the weaker party in the law governing prenuptial agreements. Although this is not usually a matter of concern during the relationship, the wife could face substantial problems if the relationship breaks down. In the absence of specific provisions under Dutch law allowing an unfair prenuptial agreement to be set aside or terminated, courts are reluctant to apply general principles of contract law, such as reasonableness and fairness, to mitigate unfair consequences for the weaker party in such situations.

8.4.3 *Termination of Prenuptial and Tenancy Agreements*

The grounds on which a Dutch landlord can terminate a residential tenancy agreement that has been entered into for an indefinite period of time are strict and are set down in the law. Firstly, the landlord can terminate the contract if the tenant does not behave as a good tenant should; for example, if the tenant causes nuisances or does not pay the rent. If a landlord needs the house for himself and has made provision for this in the contract, he also has the right to terminate the contract. If no such provision is made in the contract, both parties' interests have to be assessed by the court responsible for ruling whether the contract can be terminated. This provision is used more often by private landlords than by commercial landlords. On the other hand, a housing corporation landlord can terminate the contract if it needs to renovate the building. In this way, Dutch tenancy law takes account of the different types of parties and different types of relationship involved.

In contrast with other contracts, a tenancy agreement does not automatically end when the tenant dies. A spouse or registered partner automatically becomes party to the contract by law and so continues the contract. The contract also automatically continues for a further six months in the case of an unofficial partner who has lived in the house with the tenant. During this six-month extension period, the unofficial partner can request to take over the tenancy. This request will be granted if the partners had a shared household. These rules, which in effect allow a third party to take the contract over, acknowledge the interdependence of parties to the contract and possible third persons.

Prenuptial agreements, on the other hand, are so intertwined with marriage that they end at the moment the marriage ends. Given their affective relationship, it is not desirable to force spouses to continue their marriage and, thereby, their prenuptial agreement against their will by, for example, denying them the right to a divorce. This applies even if it runs counter to other relational contracts that stress the importance of continued cooperation. In this situation, it is the relationship, rather than the prenuptial agreement, that prevails.

8.4.4 *Application of Relational Contract Theory to Prenuptial and Tenancy Agreements*

Classical contract law tends to treat all contracts as sales contracts by emphasizing on the moment when the contract is concluded as the moment when all the parties' future rights and obligations are established. However, long-term contracts require more flexibility. Owing to the relational nature of these contracts, the way in which they are regulated should take account of the parties' behaviour. This differs from the behaviour regulated by short-term contracts as, instead of focusing solely on their own interests, the parties to

long-term contracts will normally try to cooperate, to be flexible, and to take account of the other party's wishes, because preserving the ongoing relationship is of more importance than the, possibly out-dated, stipulations of the written contract. Comparing the two long-term contracts – prenuptial agreements and tenancy agreements – shows the pitfalls of applying general contract law to long-term contracts, and the benefits of making specific provisions for such contracts.

One aspect that is important to take into account for the purposes of regulating long-term agreements is – using the terminology of the RCT – *presentiation*: in other words, the possibility for parties to a long-term contract to bring their future needs into the present at the moment of entering into the contract. Here, Dutch law can be seen to differ in its approach to regulating the problems related to *presentiation*. Tenancy law, for example, includes specific provisions to deal with the changes that often arise due to the long duration of tenancy agreements and the impossibility of predicting parties' future circumstances. This makes these contracts more flexible and able to be changed during the term of the agreement.

Prenuptial agreements, by contrast, are treated in Dutch contract law in the same way as sales contracts, with the result that full *presentiation* is not possible. The general principles of consent, freedom of contract, and *pacta sunt servanda* apply to prenuptial agreements, which turns such agreements into static agreements, with little if any scope to redress changed circumstances.³⁸ This can leave parties destitute and force them to resolve their problems on the basis of an agreement they entered into before their marriage. This applies even if, say, they have been married for thirty or forty years, given that few spouses 'renegotiate' their prenuptial agreement, or, if they do, it will be seen as at least a sign of mistrust.³⁹ The requirement for a prenuptial agreement to be recorded in a notarial deed makes it even less flexible as the parties cannot then make any adjustments to the agreement without going to a notary, something which rarely occurs in practice. In addition, couples tend to overestimate the chances that they will not divorce. They tend to see their future too rosy and are, therefore, unprepared for the consequences of things turning out differently.⁴⁰ This, in turn, can have an adverse impact on one of the parties if the prenuptial agreement provides for a total separation of property and the spouses have a traditional role division, where the wife is then the weaker party to the contract. This is partly due to gender roles in our society, where women tend to work less once they have children and thus become more dependent on their husband.

Another aspect to be considered is the behavioural norms of parties to a long-term contract, and this is emphasized and explained by the RCT. The importance of these

38 The only exception to this is the requirement for prenuptial agreements to be recorded in a notarial deed.

39 Sanders, *supra* note 8, p. 334.

40 L.A. Baker & R.E. Emery, 'When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage', 17 *Law Hum. Behav.* 1993, p. 446; J.A. Lavner, B.R. Karney & T.N. Bradbury, 'Newlyweds' Optimistic Forecasts of Their Marriage: For Better or for Worse?', 27 *J. Fam. Psychol.* 2013, p. 536.

norms for the way in which agreements are regulated is acknowledged by the Dutch legislature in the case of tenancy agreements, unlike in the case of prenuptial agreements. Specifically, there are already relational elements in the specific provisions of tenancy law that influence parties' behaviour and force them to cooperate in order to protect the weaker party to the contract. Residential tenancy law includes many mandatory provisions aimed at protecting tenants. Landlords are thus forced to take tenants' needs into consideration: rent for social housing, for example, is regulated by the state, while residential tenancy agreements can only be terminated in a limited number of situations, and third parties have a right to take over the tenancy agreement after the death of the original tenant. On the other hand, Dutch tenancy law also leaves some scope for flexibility as a landlord has the right to unilaterally force a tenant to change the tenancy agreement. These special provisions show that contract law can allow more attention to be paid to the relational nature of the contract.

Although Dutch contract law takes no account of behavioural norms in regulating prenuptial agreements, these norms do dictate the way in which parties behave in such agreements. The relationship between spouses in a prenuptial agreement is heavily relational, with a focus on cooperation, flexibility, reciprocity, and solidarity. It is the behaviour of the parties that stems from their relationship that regulates their dealings with each other as spouses are likely to pay little attention to the prenuptial agreement itself, until the marriage starts falling apart and it will become relevant again. This agreement will not, therefore, evolve in the same way as their relationship evolves over the course of their lives. More attention needs to be paid to behaviour than to the 'black and white' letter of the contract that the parties signed before they got married. This behaviour creates expectations, and these expectations should be acknowledged by law, for spouses ignore or deviate from their own prenuptial agreements. In other words, behavioural norms should give rise to legal norms and contract law regulating prenuptial agreements should be amended to take account of and possibly incorporate these insights from RCT.

8.5 CONCLUSION

Dutch contract law contains three general principles of classical contract law: consent, freedom of contract, and *pacta sunt servanda*. Modelled on synallagmatic spot relationships such as sales contracts, the emphasis in contract law is on the moment that parties enter into the contract. However, the DCC provisions on contract law, which are based on these principles, are problematic when applied to long-term contracts and, more specifically, to Life Time Contracts. This chapter argues that a different model is needed for these types of contracts. The application of RCT, which focuses on the contracting parties' behaviour during the term of the contract rather than on the 'black and white' letter

of the contract, is more suited as the general contract theory in the case of long-term contracts.

The conclusion, then, is that, in the case of relational contracts, contract law should focus primarily on the relationship between the parties and only secondarily on the wording of the relevant contract. A discrete contract is more likely to be a contract in which the relationship between the parties is of little or no importance. A relational contract, in contrast, is often a long-term contract in which the relationship between the parties is vitally important. In the case of long-term relational contracts, the contracting parties are primarily influenced by behavioural norms and only secondarily by the provisions of their contract. The expectations that flow from the parties' behaviour should thus be acknowledged in law. After examining the application of the RCT to Life Time Contracts such as tenancy and prenuptial agreements, it can be concluded that Dutch tenancy law is more in line with the RCT, while Dutch law governing prenuptial agreements is much less so, and that this leads to problems when applying classical contract law to this latter type of agreement. The comparison between the way in which these two specific types of contracts are regulated under Dutch law provides an example of a case (tenancy agreements) in which the law has already been amended to take account of the relational nature of the contract and an example of a case (prenuptial agreements) in which this has not yet been done, despite such amendment being sorely needed.

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PART II

A SPECTRUM OF PROBLEMS TO
APPROACH THE PRINCIPLES OF
LIFE TIME CONTRACTS

